Supreme Court, U. S.
FILED
APR 21 1976

No. 75-1519

In the

Supreme Court of the United States

OCTOBER TERM, 1975

MARTIN M. FAHEY,

Petitioner,

vs.

HOLY FAMILY HOSPITAL, an Illinois Not-For-Profit Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI To The Appellate Court Of The State Of Illinois For The First Judicial District, Second Division

JACK E. HORSLEY
RICHARD F. RECORD, JR.
STEPHEN L. CORN
1807 Broadway
Mattoon, Illinois
Attorneys for Petitioner

The Scheffer Press, Inc.—(312) 263-6850

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented For Review 2

Constitutional Provision Involved 3

Statement Of The Case 3

Reasons For Granting The Writ 4

Conclusion 16

Appendix 1a

Order of June 6, 1973 of Circuit Court of Cook County, Illinois 1a

Opinion of the Appellate Court of Illinois filed September 16, 1975 ..... 4a

Table Of Authorities

Cases

People v. Love, 298 Ill. 304 (1921) 4

Falcone v. Middlesex County Medical Society, 170 A. 2d 791 (N.J., 1961) 4

Silver v. Castle Memorial Hospital, 497 P.2d 564 (Ha., 1972), motion den. 501 P.2d 60 (Ha., 1972), cert. den. 409 U.S. 1048, 93 S.Ct. 517 (1972), reh. den. 409 U.S. 1131, 93 S.Ct. 936 (1973) 9

Willis v. Santa Ana Community Hospital Ass'n., 376 P.2d 568 (Cal., 1962) 9

Bricker v. Sceva Speare Memorial Hospital, 281 A. 2d 589 (N.H., 1971), cert. den. 404 U.S. 995, 92 S.Ct. 535 (1971) 9

PAGE

Greisman v. Newcomb Hospital, 192 A.2d 817 (N.J., 1963) 9

Davidson v. Youngstown Hospital Association, 250 N.E.2d 892 (App. Ohio, 1969) 9

Sams v. Ohio Valley General Hospital Ass'n, 257 F. Supp. 369 (N.D.W.Va., 1966) 9

Woodard v. Porter Hospital, Inc., 217 A.2d 37 (Vt., 1966) 9

Spencer v. Community Hospital of Evanston, 30 Ill. App.3d 285 (1st Dist., 1975) 8

Griffin v. Illinois, 351 U.S. 12, 17, 76 S.Ct. 585, 590 (1956), reh. den. 351 U.S. 958, 76 S.Ct. 844 (1956) 11

Williams v. Illinois, 399 U.S. 235, 242, 90 S.Ct. 2018, 2022-2023 (1970) 11

Holmes v. Silver Cross Hospital of Joliet, 340 F. Supp. 125 (N.D. Ill., 1972) 9

Rosner v. Eden Township Hospital Dist., 375 P.2d 431 (Cal., 1962) 7

Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011 (1970) .. 12

Citta v. Delaware Valley Hospital, 313 F.Supp. 301 (E.D. Pa., 1970) 12

OTHER AUTHORITIES

Note, "Judicial control of actions of private associations," 76 Harv.L.Rev. 983 (1963) 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No.

MARTIN M. FAHEY,

Petitioner,

vs.

HOLY FAMILY HOSPITAL, an Illinois Not-For-Profit Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To The Appellate Court Of The State
Of Illinois For The First Judicial
District, Second Division

To The Honorable, The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

The Petitioner, Martin M. Fahey, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of the State of Illinois for the First Judicial District, Second Division, entered in this proceeding on September 16, 1975.

I.

OPINIONS BELOW.

The opinion of the Circuit Court of Cook County, Illinois was entered June 6, 1973. The Court denied a temporary injunction and ordered Respondent to give Petitioner an administrative hearing. The opinion is unreported but appears in the Appendix hereto.

FLEET THROUGH

The opinion of the Appellate Court of Illinois for the First Judicial District, Second Division, was filed September 16, 1975. Petition for rehearing was denied October 14, 1975. The opinion is officially reported at 32 Ill.App.3d 537 and unofficially at 336 N.E.2d 309 and is found in the Appendix hereto.

The Supreme Court of the State of Illinois denied Petition for Leave to Appeal on January 23, 1976 without opinion.

II.

JURISDICTION.

The highest court of the State of Illinois declined to review this case on January 23, 1976. This Petition for Certiorari is filed within ninety days of that date and seeks to review the judgment of the Appellate Court of Illinois for the First Judicial District, Second Division, which is the highest court of the State of Illinois possessing and exercising jurisdiction in this case. Jurisdiction to review the judgment in question by writ of certiorari is conferred on this Court by Section 1257, Title 28, United States Code.

III.

QUESTIONS PRESENTED FOR REVIEW.

1. Was reduction by Respondent Hospital of Petitioner's medical privileges therein, with resulting detriment to Petitioner's professional standing and income, a denial of due process where there was no reason for the change based on medical considerations or improved care for patients or on any interests of the Respondent Hospital related either to its status generally as a hospital or particularly as a private and religious institution?

2. Can Petitioner receive a hearing consistent with due process on the question of the reduction of his medical

privileges in the Respondent Hospital where the question has been prejudged, the Hospital states that the hearing would be a "courtesy" only and that the decision would not be made by the Governing Board conducting the hearing?

IV.

CONSTITUTIONAL PROVISIONS INVOLVED.

Section 1 of Amendment XIV of the Constitution of the United States providing, in pertinent part:

> ". . . No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

V.

STATEMENT OF THE CASE.

A federal question under this Amendment was raised at the outset by the allegations of paragraph nine of the Complaint, Abstract of Record on Appeal, p. 9, and by the Order of the trial court, included in the appendix hereto, which abridged the privileges and the property rights of this petitioner without due process of law, for it denied him a temporary injunction and it denied him a hearing on the diminishment of his surgical privileges without due process under Section 1 of Amendment XIV. The hearing the Order of the trial court held the petitioner was entitled to was shown by the evidence to be a "courtesy" only. Abst., p. 66, and therefore a legal nullity.

The federal question under that Amendment of the Constitution of the United States was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

FILED THROUGH

VI.

REASONS FOR GRANTING THE WRIT.

MAY IT PLEASE THE COURT:

It has long been established that the right to practice medicine by a competent person is a fundamental right of citizenship. This right is at the same time "property" within the meaning of the constitutional provisions guaranteeing due process of law. It is also included in the right to liberty and the pursuit of happiness. *People* v. *Love,* 298 Ill. 304 (1921). In the leading case of *Falcone* v. *Middlesex County Medical Society,* 170 A.2d 791 (N.J., 1961) it was held that this right was not to be arbitrarily limited or refused by private organizations, even of a professional nature. See also Note, "Judicial control of actions of private associations," *76 Harv.L.Rev. 983* (1963).

The Circuit Court below allowed the Respondent to diminish Petitioner's privileges without a hearing. The Circuit Court, however, ordered that the Respondent hold a hearing on whether the reduction should be continued. The Petitioner, because of the irremediable detriment and damage created by the reduction of his privileges for any time period, took an appeal to the Appellate Court for the First District. He sought reversal of the trial court's refusal to enter a temporary injunction pending further proceedings. The Appellate Court took away what little the Circuit Court had given. Not only did the Appellate Court hold that the temporary injunction should not have been given but apparently took the position that there was no need for any hearing at all as, at the very conclusion of its opinion, it stated:

> "We conclude, as did the trial court, that Holy Family Hospital acting through its Governing Board had the

> authority to adopt the consultation rule and remove the exemption it had granted Dr. Fahey. It could do this despite Dr. Fahey's competence and high standing as a general and gynecologic surgeon." 32 Ill.App.3d at 547; 336 N.E.2d at 316.

As authority for this, the Appellate Court referred to *Edson* v. *Griffin Hospital,* 144 A.2d 341 (Conn., 1958), but that case involved many, many hearings for the plaintiff doctor before a change in his privileges was approved. The Respondent, here, has never granted Petitioner a proper hearing and cannot, for reasons discussed below, grant any hearing that would comport with requirements of due process.

The Appellate Court did recognize that it was uncontradicted that the sole reason for the change in Dr. Fahey's status was the desire of physicians in Respondent's Department of Obstetrics and Gynecology to revoke Dr. Fahey's exemption. Sister Amata, as noted by the Appellate Court, said ". . . the [Governing] Board in reviewing its obstetrics and gynecology department was faced with the choice of either phasing it out or enforcing the department's rules as it had recommended." The recommendation to remove Dr. Fahey's exemption ". . . resulted from the department's conclusion that it could function efficiently only if its rules were uniformly enforced." This is inconsistent with the conclusion from Sister Amata that "the objective of the consultation rule was improved patient care . . .", Abstract of Record on Appeal, p. 63, but is the sole factual basis presented by the Respondent as justification for the damage it seeks to do and is doing to Dr. Fahey. Sister Amata believed that the Governing Board, "out of courtesy", Abst., p. 66, to Dr. Fahey, would be willing "in good faith" to give him a hearing but that the hearing would be meaningless since

FLEED THROUGH

the Governing Board "would be bound by the recommendation of its obstetrics and gynecology department." This suggests, at least, that the Governing Board does not exercise independent judgment and that it is not fulfilling its responsibilities to act as overseer of the Respondent Hospital but is actually controlled by political and bureaucratic forces from a department the Board is supposed to control and govern. It is clear that there is no factual basis for what the Department seeks to do to Dr. Fahey and further that the motivation for the attempted change in his status, while not precisely clear from the record in this appeal, has nothing to do with medicine, improved care for patients, or any interest of Respondent related either to its status generally as a hospital or particularly as a private and religious organization.

The Appellate Court indulged in speculation which seems contrary to the only inferences that could be correctly drawn from the record in this case. The Appellate Court suggested that neither the trial court nor the Appellate Court could infer from the record that ". . . the difficulties of the hospital's obstetrics and gynecology department resulted, in part, from the conflict caused by the exemption that had been given Dr. Fahey." One might well ask what "difficulties" the Appellate Court was talking about. No "difficulties" are shown in the record. Perhaps an answer was given by Sister Amata who testified that it had been indicated to the Governing Board that the obstetrics department was "demoralized." Abst., p. 67. There was no evidence on the point, however. The "difficulties" are never identified and certainly there was no connection between the mythical "difficulties" referred to by the Appellate Court and any legitimate concern by Respondent related to the practice of medicine or the

care of patients. The Appellate Court stated that the Governing Board "decided on uniform applications so that instead of danger to its continued existence, there could be assurance of proper and effective administration of the obstetrics and gynecology department." This is very similar to the argument advanced by the Respondent in *Rosner* v. *Eden Township Hospital District,* 375 P.2d 431 (Cal., 1962) that the plaintiff there should be excluded from the hospital staff because he was "not temperamentally suitable for hospital staff practice." In dealing with this evanescent suggestion, Chief Justice Gibson stated:

> "The fact that a doctor, due to criticisms made by him relating to treatment of patients or hospital practices, has been 'unable to get along with' some doctors or hospital personnel is not a sufficient ground to exclude him from the use of hospitals. Obviously physicians will not always agree as to the proper treatment for a patient or as to the proper practices in a hospital. The goal of providing high standards of medical care requires that physicians be permitted to assert their views when they feel that treatment of patients is improper or that negligent hospital practices are being followed. Considerations of harmony in the hospital must give way where the welfare of patients is involved, and a physician by making his objections known, whether or not tactfully done, should not be required to risk his right to practice medicine.
>
> "Moreover, a hospital district should not be permitted to adopt standards for the exclusion of doctors from the use of its hospital which are so vague and ambiguous as to provide a substantial danger of arbitrary discrimination in their application. In asserting their views as to proper treatment and hospital practices, many physicians will become involved in a certain amount of dispute and friction, and a deter-

> mination that such common occurrences have more than their usual significance and show temperamental unsuitability for hospital practice of one of the doctors is of necessity highly conjectural. In these circumstances there is a danger that the requirement of temperamental suitability will be applied as a subterfuge where considerations having no relevance to fitness are present." 375 P.2d at 434-435.

Here, Dr. Fahey has an unquestioned right, even on the theory of the Respondent accepted by the Courts below, to practice his medical specialties under certain circumstances. He exercised that right for years. Then it was taken away arbitrarily and for reasons totally unconnected with proper practice of medicine, care of patients, or the private and religious purposes with which the Respondent Hospital is supposed to be concerned. If in fact morale in the Department of Obstetrics and Gynecology was so seriously affected by allowing Dr. Fahey, a physician that Respondent itself admits is highly qualified and in no need of supervision or consultations, to perform major gynecological operations without consultation with the members of the Department solely for the reason that Dr. Fahey was the only non-member of the Department so permitted to do so and without any concern related to proper medical practice or care of patients, then, indeed, there was a problem of morale in the Department. The problem should be dealt with by replacement of those persons who make decisions affecting staff privileges and the care of patients in the hospital upon non-medical factors. The answer would not be to reduce privileges for a physician fully entitled to them.

Indeed, Sister Amata admitted that if Dr. Fahey's privileges were not reduced, other doctors, and not Dr. Fahey, would *not* give the "best possible patient care." Abst., p. 67.

The only correct inference on the record is that the Respondent Hospital has not only totally abdicated its responsibilities to determine who and under what circumstances one has privileges for major gynecology operations, but that the Hospital has allowed non-medical factors to control such decisions. Clearly, no reason exists in this case for sanctioning the deprivation of Petitioner's constitutional rights because of Respondent's status as a hospital or as a private or religious organization since it was not the Hospital that made the decision. The record shows Respondent was the pawn of a group of private doctors, a group not protected by the immunities and privileges often associated with hospitals and private and religious organizations. However, in Illinois, as elsewhere, it is held that courts have jurisdiction over claims against private as well as public hospitals from wrongful suspension of or withholding of privileges from physicians seeking to practice therein. *Spencer* v. *Community Hospital of Evanston*, 30 Ill.App.3d 285, 288, 332 N.E.2d 525 (1st Dist., 1975); *Silver* v. *Castle Memorial Hospital*, 497 P.2d 564 (Ha., 1972), motion den. 501 P.2d 60 (Ha., 1972), cert. den. 409 U.S. 1048, 93 S.Ct. 517 (1972), reh. den. 409 U.S. 1131, 93 S.Ct. 936 (1973); *Willis* v. *Santa Ana Community Hospital Association*, 376 P.2d 568 (Cal. 1962); *Bricker* v. *Sceva Speare Memorial Hospital*, 281 A.2d 589 (N.Hamp., 1971), cert. den. 404 U.S. 995, 92 S.Ct. 535 (1971); *Greisman* v. *Newcomb Hospital*, 192 A.2d 817 (N.J., 1963); *Davidson* v. *Youngstown Hospital Association*, 250 N.E.2d 892 (App.Ohio, 1969); *Woodard* v. *Porter Hospital, Inc.*, 217 A.2d 37 (Vt., 1966); *Sams* v. *Ohio Valley General Hospital Association*, 257 F.Supp. 369 (N.D.W.Va., 1966); *Holmes* v. *Silver Cross Hospital of Joliet, Illinois*, 340 F.Supp. 125, 133 (N.D.Ill., 1972).

LEED THROUGH

The Appellate Court undertook to offer some justification for the Hospital's actions and position, which things were not advanced even by the Hospital itself. The Appellate Court attempted unsuccessfully to make an analogy between the relation of a lawyer and his client and that of a patient and his doctor. While these comments by the Appellate Court may be generally correct as a matter of abstract thinking, they really are irrelevant to the issues in this cause. The Appellate Court stated that "in our judgment" there is no substance to Dr. Fahey's position that requiring consultation would demean him in the patient's estimation. It is noteworthy that the Appellate Court in its own opinion earlier stated the evidence showed, without contradiction, medical professional opinion to the contrary. Apparently the Appellate Court nevertheless determined to disregard uncontradicted opinions of professionals in the area and substituted its own opinion, unsupported by any evidence. There was an effort to buttress that opinion by referring to standards for Obstetric-Gynecologic Hospital Services of the American College of Obstetricians and Gynecologists, the last sentence of which states, in pertinent part: ". . . but under certain specified conditions, consultation is and should be mandatory." Such "specified conditions", indicating only medically related causes, are notably absent in this case.

There is no showing that there was any change in Dr. Fahey's qualifications or competence or general suitability to perform sophisticated obstetrical and gynecological surgery at any time that he has been on the staff of Respondent's Hospital. There has to be some showing of change to warrant suspension or diminishment of his privileges. None has been shown and, in fact, it is conceded by the Respondent that the Doctor is as highly qualified and as able as he ever was. Further, to make

a change of the sort accomplished by Respondent unilaterally, a hearing is required under the authorities mentioned above. No hearing was ever granted. Plaintiff has been deprived without due process of law of property rights protected by the Constitution. The Courts below failed to correct the situation and they should be reversed.

It should also be noted that a general rule such as the one involved here can be just as arbitrary as one explicitly limited to a single individual. However, here Respondent admits that Dr. Fahey ". . . is the only one affected by this rule." Abst., p. 63. To draw a rule, purportedly general on its face, that applies only to one person at a certain time and not at another time is clearly improper. It is simple to draw general rules that look fair on paper. *Griffin* v. *Illinois*, 351 U.S. 12, 17, 76 S.Ct. 585, 590 (1956), reh. den. 351 U.S. 958, 76 S.Ct. 844 (1956); *Williams* v. *Illinois*, 399 U.S. 235, 242, 90 S.Ct. 2018, 2022-2023 (1970). If that is the standard, however, then arbitrary and unconstitutional results from such rules will abound with judicial sanction. Clearly the action of the Governing Board, which was dictated by the members of the Department of Obstetrics and Gynecology, was not an independently considered or fairly arrived at policy judgment, was aimed at one person only, the Plaintiff, and was not aimed at any other physician or condition or circumstance. It is not necessary for the Governing Board to withdraw the exemption from Dr. Fahey to be sure that all other physicians, not possessing Dr. Fahey's qualifications or experience and privileges under the existing rules in the particular hospital involved here, will have to have consultation on major gynecological procedures. That can be handled very simply by consistent enforcement of the rule with regard to applications for

FILED THROUGH

new privileges. The effect of the ruling by the Governing Board can affect only one human being and that is Dr. Martin M. Fahey. It was adopted at the behest of the members of the Department for reasons unrelated to the care of patients or the Petitioner's qualifications and it is constitutionally infirm.

It is familiar learning that where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses and the decision maker must be impartial. *Goldberg* v. *Kelly*, 397 U.S. 254, 269-271, 90 S.Ct. 1011, 1021-1022 (1970). *Goldberg* has been cited as compelling authority in a leading case involving reduction or suspension of a physician's hospital privileges. *Citta* v. *Delaware Valley Hospital*, 313 F.Supp. 301 (E.D.Pa., 1970). While recognizing in that case that due process requirements vary according to circumstances and must be adapted to particular situations, it was also recognized that if the functions of investigating, prosecuting and judging have been combined in a single person or entity, a fair hearing will be presumed to be unavailable and actual bias need not be shown. 313 F.Supp. at 311. In the *Citta* case, it was also held that if the actual policy making or decision making body simply exercises some type of "appellate review" wherein the decision made only was whether someone else's decision was against the manifest weight of the evidence or supported or unsupported, that would itself be a constitutionally infirm procedure. 313 F.Supp. at 312. In *Citta*, the court held that a physician's privileges could be summarily suspended without a hearing where personal observation had been made of some improper or questionable handling by the physician. It was made clear, however, that where that occurs, an adjudica-

tory hearing within a reasonable time after suspension must be given the physician. 313 F.Supp. at 310. In the present cause, the Respondent admitted that there was no change in the quality or competence of Dr. Fahey's practice in its facilities. Clearly, there could be no justification, as there was in *Citta,* for suspension or reduction of privileges without an adjudicatory hearing. But this is what occurred. And it has been erroneously sanctioned by the courts below. Petitioner here is entitled to a preliminary injunction unless circumstances similar to those shown to have existed in the *Citta* case were present. Respondent admits no such circumstances were present and a preliminary injunction should have been issued and should be now ordered until a hearing that comports with due process is afforded Petitioner on the question of suspension or reduction of privileges.

Sister Mary Amata Sweeney, Respondent's administrator, testified that from the time the Petitioner was given exemption from the rule requiring consultation,

> ". . . we have had continuous trouble in the Department of Obstetrics and Gynecology. Namely, we had difficulty in getting anyone to even serve as Chairman; anyone to do the audit of records of surgery performed. I had difficulty in even getting members to come to meetings because they felt that their efforts were futile. And, that the Department has not been accorded its right to establish and enforce its own rules for the governance of all having privileges in their department. The Governing Board envisioned total loss of our Obstetrics and Pediatrics from Holy Family Hospital. In order to continue the four departments of a general hospital we knew that something had to be done, and that we had better enforce the rules of the Department uniformly. So we did just that." Abst., p. 65.

BLEED THROUGH

When Dr. Fahey insisted on a hearing, Sister Mary Amata's reaction was that it would be "pointless" but that "as a courtesy, I am sure we would grant him a hearing." Abst., p. 66. Sister Mary Amata further stated:

> "In my opinion, if Dr. Fahey were not required to follow the rule, I believe that the demoralization of the Department of Gynecology and Obstetrics would continue, and that we might have to phase out those services. It is certainly a fight and uphill battle all the time. And, I feel that the doctors so involved in this controversy cannot give the best possible patient care. I think there will be a loss of obstetrical and gynecologic cases at the hospital as well as in pediatrics. . . . The Department of Obstetrics and Gynecology has revived since the enforcement of the rule against Dr. Fahey. They hold regular meetings, they audit their charts, they are doing clinical reviews and I have a full time Chairman of the Department without any difficulty." Abst., p. 67.

It is clear that the hearing that would be accorded Petitioner by Respondent only as a "courtesy" would not fulfill the requirements of due process. The Respondent, for reasons asserted by Sister Mary Amata, would not give any reconsideration to the decision to diminish Petitioner's privileges and the hearing would be a mere sham. The reason for this is also evident from the testimony of Sister Mary Amata—the Governing Board has been bullied by the physicians in the Department of Obstetrics and Gynecology to attack and damage Dr. Fahey's standing without cause. The Governing Board would simply defer to the Department so that the Department could exercise ". . . its right to establish and enforce its own rules for the governance of all having privileges in their department." Abst., p. 65. Obviously, the Department is allowed by the Governing Board to operate independently

of other forces, including the Governing Board itself. Obviously, such a Governing Board could not afford a fair hearing.

In the absence of established rules for Respondent, Petitioner can receive a fair hearing only in the trial court below.

This Court should take this case to clarify the status of physicians and their right to practice medicine, a constitutionally protected right, under present day circumstances where, in both private and public hospitals, governing boards do not have actual control of day to day operations nor the knowledge to make policy decisions and where groups of doctors combining for economic motives are able to exert monopolistic control which seriously affects and impairs constitutional rights of other physicians and which has, incidentally, an unwarranted effect upon the health and care of patients. Decisions cited herein establish that the Petitioner here has a constitutional right to practice medicine and to a hearing conducted in accordance with the due process concepts before that right to practice may be affected. In Illinois today, while the right to practice medicine may exist in theory, it may be taken away without due process of law under the authority of the decision sought to be reviewed. This Court should take this case and reverse so as to afford due process to the Petitioner.

BLEED THROUGH

VII.

CONCLUSION.

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Appellate Court of the State of Illinois for the First Judicial District, Second Division.

Respectfully submitted,

JACK E. HORSLEY
RICHARD F. RECORD, JR.
STEPHEN L. CORN
1807 Broadway
Mattoon, Illinois
Attorneys for Petitioner

APPENDIX

In The

CIRCUIT COURT OF COOK COUNTY, ILLINOIS

MARTIN M. FAHEY,

Plaintiff,

vs.

HOLY FAMILY HOSPITAL, an Illinois Not-For-Profit Corporation,

Defendant.

ORDER ENTERED JUNE 6, 1973

This matter coming on to be heard upon Plaintiff's Motion for Temporary Injunction, Defendant's Answer thereto, the Court having heard and considered testimony and other evidence and argument presented, and having considered the Memoranda of Law of each party, and being otherwise fully informed and advised in the premises Does Find:

C69 1. Plaintiff is a licensed physician and is a member of the Defendant Hospital's Department of General Surgery.

2. Defendant is a private hospital, and has instituted a rule which requires all members of the Department of General Surgery who are not also members of the Department of Obstetrics and Gynecology to first consult with a member of the Hospital's Department of Obstetrics and Gynecology prior to performing major obstetrical and gynecological surgery.

3. Plaintiff for some time has been exempted from the enforcement of that rule, but by action of the

BLEED THROUGH

Governing Board of the Hospital on or about July 1972, the Defendant Hospital seeks to enforce said rule against Plaintiff and thereby require him to first seek such consultation prior to performing major obstetrical and gynecological surgery at the hospital.

4. Defendant communicated its action to Plaintiff who requested a hearing under the Hospital's By-Laws which provide for a hearing in cases of reduction in staff privileges.

5. Defendant Hospital denied Plaintiff's request for a hearing on the matter was one of rule enforcement and not reduction in privileges.

C70 6. Plaintiff's Motion for Temporary Injunction seeks to enjoin the Defendant Hospital from requiring that Plaintiff obtain such prior consultation under the rule.

7. The rule sought to be enforced against Plaintiff results in a removal of an exemption in Plaintiff's favor and therefore is a reduction in privileges within the meaning of the Hospital's By-Laws.

8. Being a reduction in privileges, Plaintiff is entitled to a hearing as provided for in the Defendant Hospital's By-Laws.

10. Plaintiff is not entitled to a temporary injunction enjoining the Defendant Hospital from removing the exemption by requiring that Plaintiff first consult with a member of the Department of Obstetrics and Gynecology prior to performing any major obstetrical or gynecological surgery in the hospital, provided that, Defendant Hospital provides plaintiff with a hearing in accordance with its By-

Laws and which defendant Hospital has assured this court will be afforded to plaintiff promptly.

Now, Therefore, It Is Hereby Ordered, Adjudged And Decreed as follows:

A. That Plaintiff's Motion for Temporary Injunc-
C71 tion be and the same is hereby denied.

B. That the Defendant Hospital grant Plaintiff a hearing in the manner provided for in its By-Laws for cases of reduction in medical staff privileges.

C. That this is a final order and disposes of all issues raised by the pleadings filed herein.

Dated: June 6, 1973

/s/ Nathan M. Cohen
Circuit Judge

BLEED THROUGH

In The

APPELLATE COURT OF ILLINOIS

First Judicial District

Gen. No. 59479

MARTIN M. FAHEY,

Plaintiff-Appellant,

vs.

HOLY FAMILY HOSPITAL, an Illinois Not-For-Profit Corporation,

Defendant-Appellee.

Appeal From Circuit Court Cook County.

Honorable NATHAN M. COHEN, *Presiding.*

MR. JUSTICE LEIGHTON delivered the opinion of the court:

This is an interlocutory appeal, the outgrowth of a controversy between a surgeon and a private hospital concerning application of a rule which would require him to consult a qualified member of the hospital's obstetrics and gynecology department before he performs any major gynecological surgery in the hospital. The surgeon filed a complaint by which he sought to restrain enforcement of the rule. After the hospital filed its answer, the surgeon made a motion for temporary injunctive relief which the trial court denied. The issue before us is whether the trial court erred in denying the motion for a temporary injunction.[1]

[1] The brief for appellant presents three differently phrased issues. However, where a trial court denies a motion for a temporary injunction, the sole question presented on appeal is whether denial of injunctive relief was an abuse of judicial discretion. *Toushin* v. *City of Chicago,* 23 Ill. App. 3d 797, 320 N.E.2d 202; *Gifford* v. *Rich,* 58 Ill. App. 2d 405, 208 N.E.2d 47.

I.

Martin M. Fahey is a physician and surgeon who was licensed to practice medicine in Minnesota in 1944 and in Illinois in 1948. He received his undergraduate education at the University of West Virginia and studied medicine there for two years before transferring to Rush Medical School of the University of Chicago from which he was graduated in December 1941. He served an internship of one year in Chicago; and then, from January 1, 1943 until October 1, 1949, with a two-year absence for military service, he was a Fellow in surgery at the Mayo Foundation in Rochester, Minnesota. During his military service, he was in the Medical Corps of the United States Army and performed general surgery in army hospitals to which he was assigned. His training at Mayo was in general surgery, neurological procedures and operative gynecology. In 1949, he became a member of the medical staff of St. Francis Hospital in Evanston, Illinois. Two years later, he earned the recognition of a specialist in general surgery, having received the certificate of a surgeon from the American Board of Surgery.

On March 10, 1961, Dr. Fahey was appointed to the medical staff of Holy Family Hospital with privileges in the Department of General Surgery. The hospital is in Des Plaines, Illinois. It is a not-for-profit corporation organized under state law and operated by the Sisters of the Holy Family of Nazareth, an order of Catholic Church nuns. Under its bylaws, the hospital is controlled by a Governing Board; and for administrative purposes, its medical services are divided into departments, one being the Department of Obstetrics and Gynecology.[2] The hos-

[2] A hospital's department of obstetrics and gynecology combines two related areas of medical science: gynecology,

BLEED THROUGH POOR COPY

pital's physicians and dentists are organized into a medical and dental staff and are granted practice privileges by the Board. Under its bylaws, and those of the staff it approves, the Governing Body has final responsibility on all matters affecting staff privileges in the hospital. Every staff member is entitled to appropriate authority and responsibility for the care of his or her patients, subject to limitations contained in staff and Board bylaws, those contained in a staff rule or regulation, or to those expressed in restrictions attached to an appointment. The bylaws of the medical and dental staff provide that "[i]n any case where the Credentials Committee does not recommend for reappointment or the Executive Committee does not recommend reappointment, or where reduction of privileges is recommended, the Administrator shall notify the physician or dentist concerned and he shall be given an opportunity of appearing before the Credentials Committee and Joint Conference Committee in joint session. After a hearing as outlined above, the Joint Conference Committee shall make final recommendation to the Governing Board."

On August 10 of the year he became a staff member at Holy Family, Dr. Fahey requested that the hospital grant him full privileges under which he could perform

---

[2] (Continued)
which deals with diseases that are peculiar to women, primarily those of the genital tract, as well as female endocrinology and reproductive physiology; obstetrics, which deals with the care of pregnant women during pregnancy, parturition and puerperium. Gynecologic surgery may be defined as the operative or manual treatment of those diseases which are peculiar to women, primarily those of the genital tract. See Stedman's Medical Dictionary 543, 1225, 867 (22nd ed. 1972); B.S. Maloy, Medical Dictionary for Lawyers 239, 421, 367 (1942); 70 C.J.S. Physicians & Surgeons §1 (1951).

gynecological surgeries. His request was supported by a document that listed 271 major surgical gynecological procedures he had performed in three Chicago area hospitals. The Board granted his request with the limitation that his privileges not include consultation in operative gynecology. This was done although Dr. Fahey was not a member of the hospital's obstetrics and gynecology department; in fact, he was the only surgeon on the hospital general staff who had the privileges that allowed him to perform major gynecological operations. He continued to enjoy these privileges, undisturbed, from October 6, 1961, when they were granted him, until early in March 1970.

At its meeting on March 10, 1970, the Governing Board approved a recommendation and adopted a rule for its obstetrics and gynecology department which required any physician not a member of that department to request a consultation with one of its qualified members before any major gynecological operation was performed in the hospital. When Dr. Fahey was informed of this fact, he declared that the rule reduced his privileges because he had always performed major gynecological operations without consulting any other physician in the hospital. Therefore, invoking the bylaws of the medical and dental staff, he took an appeal and demanded a hearing. One was given him; and at its conclusion, the committee authorized to hear him recommended to the Governing Board that Dr. Fahey be exempted from the rule. The Board approved this recommendation and so notified Dr. Fahey on April 16, 1970. This exemption was the only one authorized by the Board.

Dr. Fahey's status with regard to this matter continued until July 21, 1972 when he received a letter from Sister Mary Amata Sweeney, the hospital administrator, telling

FILED THROUGH POOR COPY

him that the Governing Board had decided to enforce, uniformly and without exemption, all rules of the obstetrics and gynecology department. This included the requirement that non-gynecologists request a consultation with a qualified member of the Department of Obstetrics and Gynecology before performing any major gynecological operation in the hospital. The consultation was to be without charge to the patient.

Dr. Fahey immediately responded to Sister Amata's letter, protesting the Board's decision and contending that it was a reduction of his privileges, one imposed on him without a hearing, in violation of medical and dental staff bylaws. He demanded a hearing. Sister Amata, however, refused to authorize one because in her view, and that of the Governing Board, application of the rule to him was not a reduction of Dr. Fahey's privileges; it was only a uniform enforcement of a rule throughout the hospital medical staff. Dr. Fahey, nonetheless, argued that the Board was not uniformly applying a rule because he was the only surgeon affected; he was the only member of the medical staff who had been exempted from the consultation requirement. Despite his insistence, a hearing was not given Dr. Fahey; so, he filed the suit in this case and then made his motion for a temporary injunction.

At its hearing, the testimonial evidence came from five witnesses, four in support and one against the motion. The physical evidence came in 11 exhibits, seven in support and four against the motion, including a copy of the Standards for Obstetric-Gynecologic Hospital Services published by the American College of Obstetricians and Gynecologists and the bylaws which showed that when staff privileges at Holy Family Hospital were to be reduced, the doctor involved was entitled to a hearing before final recommendations were made to the Board.

Dr. Fahey testified concerning his qualifications as a surgeon, his experience as a staff member of Holy Family Hospital, his exemption from the consultation rule and the notice he received, without a prior hearing, that the exemption was being removed by the hospital Governing Board. He described to the trial judge how he went to Sister Amata and told her that application of the rule to him was going to ruin his professional standing as a highly regarded surgeon and lead to the loss of his practice. He said that Sister Amata replied, "Oh, doctor, this doesn't mean very much. All you have to do is tell your patient in the hospital that the rules require you to have a consultation with a member of the Department of Gynecology and Obstetrics." This assurance, Dr. Fahey said, did not calm his concern. He told the court of his request for a hearing that was denied and of his belief that the recommendations of the obstetrics and gynecology department that the consultation rule be uniformly applied were brought about by fellow doctors who were envious of his success as a gynecologic surgeon.

Three colleagues of Dr. Fahey testified for him with two of them saying they were familiar with the consultation rule and it was their opinion that such a mandatory requirement demeaned a doctor in the estimation of his patients. One doctor with extensive medical practice experience explained to the trial judge that the opinion of a consulting doctor was not binding on the requesting doctor. The consulting doctor comes into the medical case; he may or may not examine the patient and he may or may not convey his views to him; he forms his opinion, enters it on the patient's medical chart, and thereafter it is for the requesting doctor to decide how he will proceed.

Sister Amata was the hospital's only witness. She testified about her training and education in hospital adminis-

LEED THROUGH POOR COPY

tration, her knowledge of the consultation rule, its origin and purpose. She said the decision of the Governing Board to remove Dr. Fahey's exemption from the rule came on recommendation of the obstetrics and gynecology department that its rules be uniformly applied to all members of the hospital medical staff. This recommendation resulted from the department's conclusion that it could function efficiently only if its rules were uniformly enforced. She said the Board in reviewing its obstetrics and gynecology department was faced with the choice of either phasing it out or enforcing the department's rules as it had recommended. She insisted there was no substance to Dr. Fahey's belief that application to him of the rule was brought about by envious fellow doctors. She testified to having told Dr. Fahey he could not have a hearing because she and members of the Governing Board did not look upon its application as a reduction of his privileges. They were not telling Dr. Fahey that he could not perform major gynecologic operations in the hospital; all they were requiring of him was to request a consultation before doing so. The consultation was to be free of any expense to the patient. The objective of the consultation rule was improved patient care and, as in the case with consultations among physicians generally, it was not intended to bind or limit the professional discretion of the requesting doctor. Sister Amata told the trial judge that there had never been any question about Dr. Fahey's capabilities as a surgeon; no one had complained about any operation performed by him. She said that her feelings and those of the hospital concerning Dr. Fahey's competence as a general surgeon were very high. She believed that the Governing Board, out of courtesy to him, would be willing in good faith, to give Dr. Fahey a hearing consistent with staff bylaws; but it would be bound by the recommendation of its obstetrics and gynecology department.

After hearing the evidence and listening to the arguments of counsel, the trial court entered an order in which it found that the consultation rule the hospital was seeking to apply to Dr. Fahey would remove an exemption in his favor and thus reduce his privileges within the meaning of the medical and dental staff bylaws. Therefore, he was entitled to a hearing before the rule could be applied to him. Accordingly, the trial court ordered the hospital to give Dr. Fahey a hearing but denied his motion for a temporary injunction.

II.

In resolving the issue before us, we observe that this is not the case of a private hospital refusing either to make or renew the staff appointment of a physician. Compare *Mauer* v. *Highland Park Hospital Foundation,* 90 Ill. App. 2d 409, 232 N.E.2d 776; *Silver* v. *Castle Memorial Hospital* (Hawaii 1972), 497 P. 2d 564. Nor is this the case of an appeal being based on the claims that contrary to applicable bylaws, the staff privileges of a physician were revoked or terminated without a hearing. Compare *Ascherman* v. *San Francisco Medical Society* (1974), 39 Cal. App. 3d 623, 114 Cal. Rptr. 681.

The case here is one in which the trial court found that a hospital's removal of a rule exemption enjoyed by a surgeon reduced his staff privileges. This finding is not questioned in this court by the hospital involved. The hospital was ordered to give the surgeon, Dr. Fahey, a hearing in accordance with the bylaws of its medical and dental staff. In this appeal, he does not question this phase of the court's order. This is understandable because that ruling is consistent with decisions of other jurisdictions which hold that bylaws are an integral part of the

BLEED THROUGH POOR COPY

contractual relation between a hospital and the members of its staff. *Berberian* v. *Lancaster Osteopathic Hospital Association, Inc.* (1959), 395 Pa. 257, 149 A. 2d 456; *Adler* v. *Montefiore Hospital Association of Western Pennsylvania* (1974), 253 Pa. 60, 311 A. 2d 634; see Note, Denial of Hospital Staff Privileges: Hearing and Judicial Review, 56 Iowa L. Rev. 1351 (1971).

Dr. Fahey argues, however, that the trial court erred in denying him temporary injunctive relief. He insists that the exemption he enjoyed from the hospital's consultation rule was a valuable property right; it related to his practice of surgery, the pursuit of his chosen profession, a right that would be destroyed if the exemption were removed. Therefore, the hospital could not take away the exemption solely in order to administer, more effectively, its department of obstetrics and gynecology. Dr. Fahey points to his impeccable qualifications as a surgeon, general and gynecologic, his 11 years of staff membership, the more than 1000 gynecologic surgeries he has performed without consultation; and he argues that consultation by him is not required in order that the hospital improve the care of patients. Consequently, the Governing Board's decision to remove the exemption from his was so unreasonable and arbitrary that it denied him procedural due process, even though it was the action of a private hospital.

Holy Family counters Dr. Fahey's arguments with the contention that under the hospital's bylaws its Governing Board has final responsibility for staff appointments and for the grant, renewal, revocation or termination of staff privileges. The Board's determination concerning these matters, the hospital insists, are not judicially reviewable; but in any event, removal of Dr. Fahey's exemption from

the consultation requirement was in fact a uniform application of a rule within the hospital's medical staff. For these reasons, the trial court could not interfere with the decision of the Governing Board by issuance of a temporary injunction.

From these arguments and the contention advanced to meet them, there arises the question whether a private hospital, solely in order to administer and regulate its obstetrics and gynecology department, can remove an exemption enjoyed by a staff surgeon and require him to consult with a qualified member of its obstetrics and gynecology department before he performs any major gynecological operation in the hospital, even though the surgeon has been on the hospital staff for 11 years and, without consulting any other physician, has efficiently and satisfactorily performed more than 1000 major gynecologic operations. The answer to this question, in our judgment, is found in the legal principles that define the autonomy and power of governing boards of private hospitals.

III.

It is generally said that all classes of hospitals have at least one power in common. All of them can prescribe reasonable rules for the conduct of their affairs; and all may adopt rules that standardize the administration of their particular institution. See *Olander* v. *Johnson*, 258 Ill. App. 89; compare *Harris* v. *Thomas* (Tex. Civ. App. 1920), 217 S.W. 1068. A governing board to which is committed the management and control of a private hospital has the power to adopt any regulation that is reasonable and consistent with its general purposes. See *People ex rel. Replogle* v. *The Julia V. Burnham Hospital*, 71 Ill. App. 246, 249. And where the bylaws of a private hospital

BLEED THROUGH POOR COPY

place on its governing board the final responsibility for staff appointments and granting of privileges, loss of staff privileges which may cause a physician inconvenience and probably loss of income, standing alone, will not justify the issuance of a temporary injunction against the hospital. (*Rutledge* v. *St. Vincent Memorial Hospital,* 67 Ill. App. 2d 156, 214 N.E.2d 131.) This is so because issuance of a temporary injunction to prevent modification or revocation of staff privileges would determine, in effect, the manner by which a governing board is to discharge its responsibility. Compare *State ex rel. Sams* v. *Ohio Valley General Hospital Association* (1965), 149 W.Va. 229, 140 S.E.2d 457, 462; *Shulman* v. *Washington Hospital Center* (D.C. 1963), 222 F. Supp. 59; *Levin* v. *Sinai Hospital of Baltimore City* (Md. App. 1946), 46 A. 2d 498.

In this case, the bylaws placed final responsibility for staff appointments and granting of practice privileges in Holy Family Hospital on its Governing Board. Accordingly, and on a department recommendation, the Board adopted a rule that required all non-gynecologist surgeons to consult with a qualified member of the obstetrics and gynecology department before any major gynecological surgery was performed in the hospital. Dr. Fahey was a non-gynecologist, although, a competent and highly regarded surgeon, general and gynecologic. He was not an obstetrician; he was not a member of the obstetrics and gynecology department. A physician like Dr. Fahey, although he is licensed to practice medicine in this state, does not have an absolute right either to staff membership or practice privileges in a private hospital. See *Dayan* v. *Wood River Township Hospital,* 18 Ill. App. 2d 263, 152 N.E.2d 205. And in the exercise of its discretion as a managing authority, the governing board of a pri-

vate hospital has the right to regulate licensed physicians or even exclude them from the use of hospital facilities. See *Rao* v. *Auburn General Hospital* (1973), 10 Wash. App. 361, 517 P. 2d 240; 40 Am. Jr. 2d Hospitals and Asylums §8 (1968). Therefore, the consultation rule which in this case only restricted Dr. Fahey's use of the facilities in Holy Family Hospital could be applied to him. However, on his first appeal, and on recommendation of the committee that heard him, the Board, although it did not have to, exempted Dr. Fahey from the rule. He enjoyed this exemption for more than two years when it was called to the Board's attention that the obstetrics and gynecology department was not functioning properly because of uneven application of its rules. The evidence in the record suggests to us, as it must have to the trial judge, that the difficulties of the hospital's obstetrics and gynecology department resulted, in part, from the conflict caused by the exemption that had been given Dr. Fahey. As a consequence, the Board had to decide whether the rules of the department were to be uniformly applied to all members of the medical staff, or only to some. It decided on uniform application so that instead of danger to its continued existence, there could be assurance of proper and effective administration of the obstetrics and gynecology department.

Dr. Fahey has argued in the trial court and before us that, as a result of his competence and high standing as a general and gynecologic surgeon, the Board could not remove his exemption from the consultation rule because there was no reason for the removal. Dr. Fahey insists that consultation requested by him, when discovered by his patient, demeaned him in the patient's estimation with resulting deterioration and ultimate loss of his profes-

BLEED THROUGH POOR COPY

sional practice. In our judgment, there is no substance to this argument.

Without claiming special insight into the relation that exists between a surgeon and a patient who comes to him for a gynecological procedure, we are tempted to observe that clients of lawyers and the patients of doctors have much in common. Whatever may be their differences, both professional relations depend in large measure on interpersonal candor, confidence and trust. For this reason, we believe that a patient in need of a gynecologic surgery who is told, honestly and forthrightly, as Sister Amata suggested to Dr. Fahey, that a hospital rule requires the surgeon to consult with a qualified member of the obstetrics and gynecologic department before he performs a major gynecological procedure, will understand that explanation without any deterioration in her relation with the surgeon. This belief finds support in section VII, par. A of the Standards for Obstetric-Gynecologic Hospital Services of the American College of Obstetricians and Gynecologists in which members of the profession are told that "[t]he free use of consultations serves as a means of maintaining high standards of professional service. Consultation in no way suggests incompetence; rather, it indicates a high degree of maturity and judgment. The patient is accorded the advantages of additional thought and experience in the management of her problem. The physician shares the responsibility for this professional decision and also increases his own knowledge. The hospital maintains its high standards by the free use of additional professional judgment, thus preventing avoidable errors. In general, it is the duty of the attending physician to decide whether or not a consultation is in order, but under certain specified conditions, consultation is and should be mandatory."

This standard was part of the evidence received at the hearing of Dr. Fahey's motion for temporary injunction. The allegations of the complaint and those of the motion had been put at issue by answers, without any question being raised concerning sufficiency of the pleadings. The trial court heard evidence and reviewed the issues, including Dr. Fahey's claim that, without a hearing, as required by staff bylaws, the Governing Board of the hospital had reduced his staff privileges. Therefore, the rule of *Mauer* v. *Highland Park Hospital Foundation,* 90 Ill. App. 2d 409, 232 N.E.2d 776, that a private hospital's actions concerning staff appointments or privileges are not subject to judicial review, does not apply to this case. We conclude, as did the trial court, that Holy Family Hospital acting through its Governing Board had the authority to adopt the consultation rule and remove the exemption it had granted Dr. Fahey. It could do this despite Dr. Fahey's competence and high standing as a general and gynecologic surgeon. See *Edson* v. *Griffin Hospital* (1958), 21 Conn. Sup. 55, 144 A. 2d 341. For these reasons, the trial court did not error in denying Dr. Fahey's motion for a temporary injunction. See Annot., 37 A.L.R. 3d 645, 681. The order is affirmed.

AFFIRMED.

DOWNING, *P.J.*, and STAMOS, *J.*, concur.

BLEED THROUGH POOR COPY

FILED
MAY 20 1976

No. 75-1519

In the
Supreme Court of the United States
October Term, 1975

MARTIN M. FAHEY,

Petitioner,

vs.

HOLY FAMILY HOSPITAL, an Illinois Not-For-Profit Corporation,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI To The Appellate Court Of The State Of Illinois For The First Judicial District, Second Division

Di Leonardi and O'Brien, Ltd.
790 Lee Street
Des Plaines, Illinois
Attorneys for Respondent

Robert J. Di Leonardi,
of Counsel

The Scheffer Press, Inc.—(312) 263-6850

TABLE OF CONTENTS

PAGE

I. Further Statement of the Case 1

II. Argument 3

A. The Petition For Writ Of Certiorari Should Be Denied Because The Constitutional Question of Due Process Is Now Moot 3

B. The Petition Should Be Denied Because There Is Not A Federal Question Of Substance Involved In This Proceeding Which Has Not Heretofore Been Determined By This Court .. 3

C. The Petition Should Be Denied Because The Hospital Was Not Involved In State Action Within The Meaning Of The Fourteenth Amendment 4

D. It Is Not True That There Were No Medical Reasons Or Considerations Of Improved Patient Care Which Motivated The Enforcement Of The Rule Against Petitioner .. 6

III. Conclusion 11

Table Of Authorities

Dayan v. Wood River Township Hospital, 18 Ill. App. 2d 263, 171 N.E. 2d 675 4

Hayman v. City of Galveston, 273 U.S. 414 3

Kaplan v. Carney, No. 74-600C(4) (U.S.D.C., E.D. Mo., Nov. 6, 1975) 9

Klinge v. Lutheran Charities Association of St. Louis [8th Cir., Aug. 4, 1975] 8

Mauer v. Highland Park Hospital, 90 Ill. App. 2d 409, 232 N.E. 2d 776 4

PAGE

Mulvihill v. Julia L. Butterfield Memorial Hospital, 329 F. Supp. 1020 (1971) 5

Rutledge v. St. Vincent Memorial Hospital, 67 Ill. App. 2d 156, 214 N.E. 2d 131 4

Selden v. City of Sterling, 31 Ill. App. 455, 45 N.E. 2d 329 4

Simkins v. Moses H. Cone Memorial Hospital, 323 F. 2d 959, 968 (4th Circuit) cert. den. 376 U.S. 938, 84 S. Ct. 793, 1964 5

Woodbury v. McKinnon, 447 F. 2d 839 (5th Cir., 1971) 8

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No.

MARTIN M. FAHEY,

Petitioner,

vs.

HOLY FAMILY HOSPITAL, an Illinois Not-For-Profit Corporation,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

I.

FURTHER STATEMENT OF THE CASE

Petitioner misleads this Court when he says in his statement of the case that the "trial court . . . denied him a hearing on the diminishment of his surgical privileges without due process . . ." The trial court did no such thing. In fact, not only did it not deny Petitioner a hearing, it ordered the Hospital Governing Board to give Petitioner a full hearing as required by the Hospital By-laws. In its order of June 6th, 1973 (Appendix, 1-a) the trial court found:

"7. The rule sought to be enforced against Plaintiff results in a removal of an exemption in Plaintiff's favor and therefore is a reduction in privileges within the meaning of the Hospital's By-laws.

8. Being a reduction in privileges, Plaintiff is entitled to a hearing as provided for in the Defendant Hospital's By-laws."

Based upon the aforesaid findings, the trial court went on to order as follows:

"B. That the Defendant Hospital grant Plaintiff a hearing in the manner provided for in its By-laws for cases of reduction in medical staff privileges."

By this further statement of the case, Respondent wishes to correct any misunderstanding which may have resulted from Petitioner's statement of the case concerning whether or not the trial court denied Petitioner a hearing prior to the reduction of privileges. The exact opposite is true. The hearing was ordered, held by the Hospital and thereafter the rule in question was voted by the Hospital Governing Board to be enforced against Petitioner. No appeal or subsequent legal proceeding was ever brought by Petitioner from that subsequent action of the Hospital Governing Board.

II.

ARGUMENT

A. The Petition For Writ Of Certiorari Should Be Denied Because The Constitutional Question Of Due Process Is Now Moot.

Petitioner bottoms his argument that he was denied due process of law on the assertion that he was not granted a hearing by the Hospital Governing Board prior to the enforcement of the medical staff ruling against him. As can be seen from the further statement of the case, *supra,* the trial court found with Petitioner, and against the Hospital, that the rule enforcement was a reduction in privileges and, therefore, required a hearing before the Hospital Governing Board. The trial court ordered such a hearing to take place, and it did. Petitioner and his attorney appeared at the hearing and, after every opportunity to present evidence, which Petitioner did in fact do, the Hospital Governing Board voted to enforce the rule against him, all in accordance with the By-laws of the Hospital. That having occurred, it is clear that Petitioner was never deprived of any hearing to which he was entitled, and that, therefore, there was no due process of law. Any argument based upon lack of hearing is moot, the hearing having been given to Petitioner from which he has never filed any appeal or other legal proceeding.

B. The Petition Should Be Denied Because There Is Not A Federal Question Of Substance Involved In This Proceeding Which Has Not Heretofore Been Determined By This Court.

In *Hayman* v. *City of Galveston,* 273 U.S. 414, this Court held that a physician has no absolute right to any

D THROUGH POOR COPY

degree of medical staff privileges. From that and numerous other cases, both State and Federal, it is well established that governing boards in private hospitals have the right to determine what medical staff privileges may be granted, altered and revoked. Such determination has been made on numerous occasions in the Illinois courts including in *Selden* v. *City of Sterling,* 31 Ill. App. 455, 45 N.E. 2d 329 and *Dayan* v. *Wood River Township Hospital,* 18 Ill. App. 2d 263, 171 N.E. 2d 675. Accordingly, the vast majority of states follow the rule that, given the exclusive powers of private hospitals to determine all questions relating to staff privileges, governing board decisions relating to staff privileges are not reviewable by the courts. *Mauer* v. *Highland Park Hospital,* 90 Ill. App. 2d 409, 232 N.E. 2d 776; *Rutledge* v. *St. Vincent Memorial Hospital,* 67 Ill. App. 2d 156, 214 N.E. 2d 131.

Thus, it can be seen that there is no federal question of substance to be determined upon appeal to this Court. It is well settled that private hospitals may determine the extent of medical staff privileges, and the manner in which they may be revoked, suspended or altered. This case gives rise to no new factual situation or circumstance which would warrant a review by this Court, even if there was any fact from which it could be argued Petitioner was denied a hearing prior to reduction of privileges.

C. The Petition Should Be Denied Because The Hospital Was Not Involved In State Action Within The Meaning Of The Fourteenth Amendment.

It is clear that Holy Family Hospital, as a private hospital, was not engaged in state action to give rise to a federally protected right under the Fourteenth Amendment. As was stated by the United States District Court for the Southern District of New York in *Mulvihill* v.

Julia L. Butterfield Memorial Hospital, 329 F. Supp. 1020 (1971):

> "A private hospital is subject to the precepts of the Fourteenth Amendment only if its actions are tinged with some measure of state involvement. It is an uncontroverted principle that the action inhibited by the due process clause of the Fourteenth Amendment is only such action as may be said to be that of the states. . . . private conduct abridging individual rights does not violate the Fourteenth Amendment 'unless to some significant extent the state in any of its manifestations has been found to have become involved in it.'" (Citations omitted.)

In the *Mulvihill* case, the Court found that the involvement of Butterfield Memorial Hospital in Hill-Burton funds did not take it out of its scope as a private hospital, so as to involve it in state action for purposes of the Fourteenth Amendment. In that case, Plaintiffs were specialists in internal medicine and sued the hospital when the hospital voted not to reappoint the Plaintiffs. Plaintiffs argued that they were denied equal protection of the laws and due process because they were discharged without notice or a hearing. In distinguishing that factual situation from other cases, including *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F. 2d 959, 968 (4th Circuit) certiorari denied, 376 U.S. 938, 84 S. Ct. 793, 1964, the Court said:

> ". . . there is nothing in the language or logic of these cases to support the proposition that state action would have been present had the private hospitals in question discharged an employee without notice or a hearing. This is the conduct which is challenged in the present case, and the state is in no way involved in it."

ED THROUGH POOR COPY

In the case at bar, the Respondent, Holy Family Hospital, is a private, Catholic hospital and, as such, is not an instrumentality of the state or otherwise involved in state action within the meaning of the Fourteenth Amendment. That being the case, Petitioner's due process argument is without merit.

D. It Is Not True That There Were No Medical Reasons Or Considerations Of Improved Patient Care Which Motivated The Enforcement Of The Rule Against Petitioner.

Contrary to the assertion of Petitioner under Point I of its Questions Presented For Review (page 2 of its Petition) there were sound medical care and patient care reasons for enforcing the ruling against Petitioner. For example, see the testimony of Sister Mary Amata Sweeney contained on pages 13 and 14 of the Petition. In particular, attention is called to that portion of her testimony contained on page 14 of the Petition as follows:

> "In my opinion, if Dr. Fahey were not required to follow the rule, I believe that the demoralization of the department of Gynecology and Obstetrics would continue, and that we might have to phase out those services. . . . I feel that the doctors so involved in this controversy cannot give the best possible patient care. I think there will be a loss of obstetrical and gynecologic cases at the hospital as well as in pediatrics. . . . The Department of Obstetrics and Gynecology has revived since the enforcement of the rule against Dr. Fahey. . . ."

Certainly, the motivation of the Hospital to enforce its rules uniformly, including against Dr. Fahey, the maintenance of a viable Department of Obstetrics and Gynecology, as well as the uncontroverted testimony at the trial court that this particular rule was recommended

by the American College of Surgeons, are reasons going to the improvement of patient care. Such judgments by private hospitals should not be disturbed by courts of review. As the Illinois Appellate Court observed in its opinion in favor of the Hospital (page 15a of Petition):

> ". . . the consultation rule which in this case only restricted Dr. Fahey's use of the facilities in Holy Family Hospital could be applied to him. However, on his first appeal, and on recommendation of the committee that heard him, the Board, although it did not have to, exempted Dr. Fahey from the rule. He enjoyed this exemption for more than two years when it was called to the Board's attention that the Obstetrics and Gynecology Department was not functioning properly because of uneven application of its rules. The evidence in the record suggests to us, as it must have to the trial judge, that the difficulties of the Hospital's Obstetrics & Gynecology Department resulted, in part, from the conflict caused by the exemption that had been given Dr. Fahey. As a consequence, the Board had to decide whether the rules of the department were to be uniformly applied to all members of the medical staff, or only to some. It decided on uniform application so that instead of danger to its continued existence, there could be assurance of proper and effective administration of the Obstetrics and Gynecology Department."

The Court went on further to state in its opinion as follows:

> "Dr. Fahey has argued in the trial court and before us that, as a result of his competence and high standing as a general and gynecologic surgeon, the Board could not remove his exemption from the consultation rule because there was no reason for the removal. Dr. Fahey insists that consultation requested by him, when discovered by his patient, demeaned him in the patient's estimation and would result in deterioration

FED THROUGH POOR COPY

and ultimate loss of his professional practice. In our judgment, there is no substance to this argument.

"Without claiming special insight into the relation that exists between a surgeon and a patient who comes to him for a gynecological procedure, we are tempted to observe that clients of lawyers and patients of doctors have much in common. Whatever may be their differences, both professional relations depend in large measure on inter-personal candor, confidence and trust. For this reason, we believe that a patient in need of gynecologic surgery who was told, honestly and forthrightly, as Sister Amata requested to Dr. Fahey, that a Hospital rule requires the surgeon to consult with a qualified member of the Obstetrics and Gynecology Department before he performs a major gynecological procedure, will understand that explanation without any deterioration in her relation with the physician. This belief finds support in Section VII, Paragraph A of the Standards for Obstetric-Gynecologic hospital services of the American College of Obstetricians and Gynecologists . . ."

Following the guide of a *recent appeals court decision* in its circuit (*Klinge* v. *Lutheran Charities Association of St. Louis* [8th Cir., Aug. 4, 1975]), a federal district court granted the defendants' motion for summary judgment and held "that due process was provided both when plaintiff [physician] was placed on probation and when his status was reduced." Determinations by the hospital were based primarily on in-hospital and outside professional standards' review of a selected group of the physician's charts. Under these circumstances, the court rejected plaintiff's contention that he was constitutionally entitled to cross-examine witnesses against him. Such an opportunity "is not the law," said the court, citing *Woodbury* v. *McKinnon*, 447 F.2d 839 (5th Cir., 1971). "Further-

more," said the court, "it is apparent that this contention is inapposite herein as there were no witnesses to cross-examine." Nor was the court willing to reverse the hospital's decision and reinstate the physician to full staff privileges, because the hospital apparently failed to follow certain internal procedures that were unspecified in the opinion. *Kaplan* v. *Carney,* No. 74-600C(4), (U.S.D.C., E.D. Mo., Nov. 6, 1975).

The defendants "confessed the jurisdiction of" the court under 28 U.S.C. §1331 ("federal question" plus $10,000 or more) and §1343 ("color of state law" and/or 42 U.S.C. §1985). The district court's memorandum opinion recites a lengthy statement of facts concerning the various hearings and actions that resulted in the plaintiff physician's staff privilege reduction to associate status and a subsequent decision confirming such status. At points in the evaluations, the questions concerning the physician's professional competence were referred to an independently incorporated physicians' organization developed, in part, to conduct peer review.

The opinion stated, "The role of this Court in reviewing the actions of the Hospital is severely limited. . . . Plaintiff was not entitled to a full trial but only to reasonable notice of the charges against him and an opportunity to be heard with respect to those charges."

Relying on the appeals court's response to a similar argument in the *Klinge* case, the district court rejected plaintiff's argument that he was denied a determination by an impartial board. The hospital's executive committee and its board of trustees "constituted proper review boards." Also, "the independent review board [formed by the state's medical societies] found inappropriate use of medication, and insufficient chart documentation."

ED THROUGH POOR COPY

Plaintiff also contended "that he was denied due process because there were no guidelines or objective criteria governing the standard to which he was held accountable." In support of this position, he also pointed, *inter alia*, to the outside group's "recommendation that the Hospital set up standards of performance." The court answered, "While it would perhaps be advantageous to have the Hospital establish definite standards, this Court is unable to conclude that the standards employed by defendants [which were not specified in the opinion] are so unreasonable, arbitrary, or capricious as to amount to a denial of due process. Precise standards of competency would be difficult to establish . . ."

Refusing to order the physician's reinstatement to full privileges because the hospital did not follow its internal procedures, the court said in part: "As has been noted repeatedly in cases of this nature, human lives are at stake. [Reinstatement of the doctor] is simply not justified under these circumstances. The Court is not saying the internal procedures are to be ignored with impunity; it is simply this Court's opinion that under the circumstances of this case, a reversal of the decision of the Hospital on this ground is unwarranted.

"It is not the role of this Court to substitute its judgment for that of the experts involved in this decision."

III.

CONCLUSION

For the reasons cited above, and upon the arguments and authorities contained in the foregoing, the Respondent, Holy Family Hospital, Inc., respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

HOLY FAMILY HOMPITAL, INC.
Respondent
By: DI LEONARDI & O'BRIEN, LTD.
790 Lee Street
Des Plaines, Illinois 60018

ROBERT J. DI LEONARDI
Of Counsel